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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

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ROBERT EARL BAILEY,

Petitioner,

*versus*

STATE OF TEXAS,

Respondent.

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CIVIL ACTION NO. 1:08-CV-860

**MEMORANDUM ORDER ADOPTING  
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Robert Earl Bailey, proceeding *pro se*, filed this petition for writ of habeas corpus. The court referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, for consideration pursuant to applicable laws and orders of this court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the petition be dismissed without prejudice for failure to exhaust state court remedies.

The court has received the Report and Recommendation, along with the record, pleadings, and all available evidence. No objections were filed to the Report and Recommendation.

**ORDER**

Accordingly, the findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered dismissing this petition.

In addition, the court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying habeas relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of

appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5<sup>th</sup> Cir. 2004). To make a substantial showing, the petitioner need not establish he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, petitioner has not shown that the issue of whether he adequately exhausted his state court remedies is subject to debate among jurists of reason. The factual and legal questions have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not issue.

SIGNED at Beaumont, Texas, this 1st day of March, 2010.

A handwritten signature in black ink, reading "Marcia A. Crone". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

MARCIA A. CRONE  
UNITED STATES DISTRICT JUDGE